Supreme Court, U.S.
FILED
DEC 16 1993
OFFICE OF THE CLERK

No. 93-813

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ALCAN ALUMINUM CORPORATION,
Petitioners,

v.

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, IN AND FOR THE THIRD APPELATE DISTRICT

BRIEF OF RESPONDENT FRANCHISE TAX BOARD IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the California courts properly declined to apply a dormant Commerce Clause analysis and properly held that, due to congressional acquiescence, California did not violate the Foreign Commerce Clause by application of worldwide combined reporting to determine the taxable California income of petitioner.

2. Whether the petitioner's trial stipulation, limiting the issues in this case to those involving "one voice" and "multiple taxation" contentions, has limited this Court's jurisdiction, with the result that petitioner is barred from raising questions concerning the four elements of the dormant Commerce Clause analysis set forth in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1974), including whether the tax assessed against petitioner was out of all proportion to its business in California.

3. If a dormant Commerce Clause analysis were appropriate, would California's use of worldwide combined reporting violate the "multiple taxation" test or the dormant portion of the "one voice" test?

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No. 93-813

In The

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October Term, 1993

ALCAN ALUMINUM CORPORATION,

Petitioner,

v.

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari To The
Court of Appeal of the State of California
In and For the Third Appellate District

BRIEF OF RESPONDENT FRANCHISE TAX BOARD IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JURISDICTION

Petitioner Alcan Aluminum Corporation ("Alcancorp") invokes jurisdiction under 28 U.S.C. § 1257(a). As argued below at pages 6-7, no such jurisdiction exists as to issues beyond the limited issues designated in the portion of the trial stipulation which is quoted below at pages 3-4.

SUPPLEMENTAL STATEMENT OF THE CASE

The petition fails to note that it is a clone of another petition already pending before this Court, in *Alcan Aluminum Corporation* v. *Franchise Tax Board of the State of California*, No. 92-1751. The earlier *Alcan* petition, with its same arguments that it was a better case for review than *Barclays Bank PLC* v. *Franchise Tax Board*, No. 92-1384, was set by this Court for conference at the same time as the *Barclays* petition. In *Barclays* this Court granted the petition for certiorari on November 1, 1993; however, this Court took no public action on the earlier *Alcan* petition, and it remains in "pending" status. This new *Alcan* petition should be accorded the same fate as the pending *Alcan* petition in No. 92-1751, with denial of both petitions as the ultimate result. Even though this petition raises exactly the same legal arguments as the *Alcan* petition in No. 92-1751, it involves a separate California judgment arising from a separate set of California Court proceedings, with separate (but identical) stipulations concerning the limitation of issues. In the interests of efficiency under these circumstances, respondent will set forth the similarities in the records and then rely by reference on the legal arguments in respondent's earlier opposition in No. 92-1751.

Like the previously filed *Alcan* petition (No. 92-1751), this case involves precisely the same primary issue as was presented to this Court in the petition in *Barclays Bank PLC* v. *Franchise Tax Board*, No. 92-1384. Both the *Barclays* case and the two *Alcan* petitions involve California's application of worldwide combined reporting ("WWCR") to determine the California taxable income of corporations which are parts of multinational, multicorporate unitary businesses headed by foreign corporations. Respondent Franchise Tax Board is arguing in *Barclays* that the California Supreme Court has properly held (in *Barclay's Bank Internat., Ltd.* v. *Franchise Tax Bd.*, 2 Cal.4th 708, 829 P.2d 279 (1992)) that the United States

Congress has acquiesced in such use of WWCR by the states. Resolution in *Barclays* of that issue in favor of the Franchise Tax Board should necessarily result in the denial of the two pending *Alcan* petitions.

Respondent Board believes that Alcancorp's statement of the case contains significant omissions which, among other things, go to the issue of whether this Court has jurisdiction over issues which petitioner seeks to have reviewed. Therefore, pursuant to rule 15.1, the Franchise Tax Board provides this Court with this supplemental statement.

Petitioner Alcancorp does not comply with this Court's rule 14(h), which requires a showing in the statement of the case "that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari." The reason for this noncompliance is simple: Alcancorp did not properly raise the federal questions involving the dormant Commerce Clause requirements set forth in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977).

Prior to the commencement of trial in this matter the parties entered into the following stipulation with respect to the issues in this case:

> "'For the purposes of this litigation, these parties hereby stipulate that the *only* legal issues before this Court are whether the Board's application of the unitary method of accounting under Section 25101 *et. seq.* of the California Revenue and Taxation Code, and implementing regulations, as applied to the facts in this case violated the Foreign Commerce Clause of the United States Constitution in that such application impermissibly prevents the federal government from speaking with *one voice* or impermissibly gives rise to either the risk of or actual *multiple taxation*. For

> purposes of this litigation, Alcan is not contesting the Board's determination that the Alcan Group Companies constitute a single unitary business under the tests formulated by the California Courts and the United States Supreme Court, or contending that the tax assessed violated the Due Process Clauses of the United States Constitution or the California Constitution.'" Quoted in the opinion of the California Court of Appeal, Pet. App. A5-A6 (emphasis added).

An identical stipulation is contained in the record of the case which gave rise to the No. 92-1751 *Alcan* petition.

In this case the California Court of Appeal has held that the California Supreme Court's decision in *Barclays* (applying this Court's decision in *Wardair Canada, Inc.* v. *Florida Dept. of Revenue*, 477 U.S. 1 (1986)) required a holding that Congress had acted to permit California's application of worldwide combined reporting; however, the California Court of Appeal also held that, even if "unexercised" or dormant Commerce Clause analysis were somehow applicable, the courts were bound by Alcancorp's waiver by stipulation of all dormant analysis elements other than enhanced risk of multiple taxation and one voice. Pet. App. A17-A18. Alcancorp was also held to be bound to its stipulation that due process is not an issue in this case. Pet. App. A14 n. 3.

This Court need not accept Alcancorp's renewed invitation (Pet. 18-20, 22-23) to delve into the complex facts concerning Alcancorp's Riverside facility, for (1) Alcancorp first says it does not need to rely upon separate accounting to establish alleged distortion under worldwide combined reporting, then proceeds to do so; (2) Alcancorp (at Pet. 16-17, 21-22) is asking this Court to discard "present doctrine," that is, to overrule more than 70 years of precedents, including *Container Corp. of America* v. *Franchise Tax Bd.*, 463 U.S. 159 (1983); (3) Alcancorp's

stipulation in the trial court limited the legal issues so as to exclude the distortion issue, thus relieving respondent Board from any burden of presenting any evidence concerning the Riverside facility in order to establish the lack of distortion; and (4) as argued in the Franchise Tax Board's earlier *Alcan* opposition in No. 92-1751, referred to below at page 6, Congress' exercise of its Commerce Clause powers in acquiescing in the states' use of worldwide combined reporting has rendered unnecessary any consideration (as part of a dormant Commerce Clause analysis) of the facts concerning the Riverside facility.

Beyond the stipulated limitation of issues, Alcancorp also has stipulated (App. A hereto) that petitioner Alcancorp did not elect to petition the Board for relief under the authority of California Revenue and Taxation Code section 25137, cited by petitioner (Pet. 3-4) as a statutory provision involved in this case.

This Court should also be aware of the actions of Canada and of the United States Executive Branch in this area. Reference is made to pages 5 and 6 of the Board's opposition to the previous *Alcan* petition in No. 92-1751. Also, respondent Board's supplemental brief in opposition to the *Barclays* petition (No. 92-1384) speaks to the current state of California legislation, which provides for a "water's edge" election with no requirements of any election fees.

ARGUMENT

I

THE CALIFORNIA COURTS HAVE PROPERLY APPLIED THIS COURT'S *WARDAIR* DECISION IN HOLDING THAT CONGRESSIONAL ACQUIESCENCE IN CALIFORNIA'S USE OF WORLDWIDE COMBINED REPORTING IS DETERMINATIVE OF THE COMMERCE CLAUSE ISSUE, WITH NO NEED FOR ANY DORMANT COMMERCE CLAUSE ANALYSIS.

Alcancorp has made the same contentions regarding *Wardair Canada, Inc.* v. *Florida Dept. of Revenue*, 477 U.S. 1 (1986), in its earlier petition in No. 92-1751, which is now pending before this Court. In the interests of efficiency and economy, respondent Franchise Tax Board refers the Court to pages 6 through 11 of the Franchise Tax Board's brief in opposition in No. 92-1751 for the Board's position regarding application of *Wardair*.

II

PETITIONER'S STIPULATION LIMITING THE ISSUES TO BE LITIGATED IN THIS CASE BARS PETITIONER FROM PRESENTING FOR THIS COURT'S CONSIDERATION THE FOUR ELEMENTS OF DORMANT COMMERCE CLAUSE ANALYSIS SET FORTH IN *COMPLETE AUTO TRANSIT* v. *BRADY*.

Jurisdiction of this Court to review state court decisions is conferred by 28 U.S.C. §1257. "It is well settled that this Court will not review a final judgment of a state court unless 'the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.'" *Bd. of Dirs. of Rotary Int'l* v. *Rotary Club*, 481 U.S. 537, 550 (1987). The issue of whether a federal question was sufficiently raised is itself ultimately a question to be decided by this Court. *Street* v. *New York*, 394 U.S. 576, 583 (1969). A litigant,

however, must follow state procedures in raising the federal question. *In re Lamkin*, 355 U.S. 59 (1957).

The trial stipulation in this case (quoted above at pages 3-4) provides that the constitutional issues raised involve *only* the "one voice" and "multiple tax" elements of Foreign Commerce Clause analysis. As noted above in the Supplemental Statement of the Case, the California Court of Appeal has held that, if any dormant Commerce Clause analysis were appropriate, taxpayer's limitation of issues by stipulation would bar the California courts from considering any issues outside the scope of the stipulation. For the reasons given on pages 12 through 16 of the Franchise Tax Board's opposition to the *Alcan* petition in No. 92-1751, this holding is a valid exercise of state power. (It is noted that in No. 92-1751 there was no direct holding by the California appellate courts on the stipulation issue. Thus the Board's position might be seen as being even more clear with regard to the present petition.)

III

EVEN IF A DORMANT COMMERCE CLAUSE ANALYSIS WERE TO BE APPLIED, THERE WOULD BE NO VIOLATION OF THE MULTIPLE TAXATION OR "ONE VOICE" ELEMENTS OF THE *JAPAN LINE* TEST.

Alcancorp raised exactly the same multiple taxation and "one voice" dormant Commerce Clause arguments in its petition in No. 92-1751. For the reasons set forth on pages 16 through 22 of the Franchise Tax Board's opposition in No. 92-1751, it is respectfully submitted that the petitioner's arguments should be rejected.

CONCLUSION

For the reasons given above and in the Franchise Tax Board's brief in opposition to the other pending *Alcan* petition (No. 92-1751), it is respectfully submitted that the petition for writ of certiorari should be denied. If this Court should decide to grant the petition, it is respectfully submitted that the issues to be argued should be limited solely to whether a dormant Commerce Clause analysis has been rendered unnecessary by congressional acquiescence in the states' use of WWCR, and, if any dormant Commerce Clause analysis is necessary, whether the "one voice" and "multiple taxation" elements of dormant Commerce Clause analysis would render California's actions impermissible.

Dated: December 16, 1993.

Respectfully submitted,

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APPENDIX A

EXCERPT FROM STIPULATION OF FACTS

(Filed in the Superior Court of the State of California, County of Sacramento, No. CV322638)

pp. 9-10 (CT 241-42):

23. Alcancorp has paid the additional assessments and has pursued administrative remedies with the Board regarding the Board assessments for the years 1965 through 1974, and has instituted suits for refund as authorized by California law. Alcancorp did not elect to petition the Board for relief under the provisions of California Revenue and Taxation Code Section 25137. (See Exhibit XIX-1 for a copy of the original Los Angeles complaint and Exhibit XIX-2 for a copy of the original Sacramento complaint.)